JUN 18 1953

# Supreme Court of the United States

October Term—1952.

No. 822 86

TOPPS CHEWING GUM, INC.,

*Petitioner,*

AGAINST

HAELAN LABORATORIES, INC.,

*Respondent.*

**RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.**

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AGAINST

HAELAN LABORATORIES, INC.,

*Respondent.*

## RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE SECOND CIRCUIT.

### Nature of the Cause of Action.

Briefly stated, the cause of action which was sustained by the court below, was primarily to enjoin petitioner from interfering with respondent's contracts with major league baseball players (R. 22-23) whereby it was granted the exclusive right to use their pictures together with their names and biographical data in connection with the sale, promotion and advertisement of its chewing gum products. The players covenanted not to grant similar rights to others.

### Opinions of the Courts Below.

The opinion of the District Court for the Eastern District of New York (R. 704) is reported *sub. nom. Bowman*

*Gum* v. *Topps Chewing Gum* in 103 F. Supp. 944. The opinions of the Court of Appeals for the Second Circuit (R. 758-774) are reported in 202 F. 2d 866, 869.

Petitioner states that Chief Justice SWAN dissented (Pet. Br., p. 9). This is not correct. Judge SWAN concurred in the reversal and remand insofar as petitioner's liability was predicated upon the ground of inducing breach of contract (R. 763).

**Jurisdiction.**

The jurisdictional requisites are adequately set forth in the petition.

**Statement.**

While the petition (Pet. Br., pp. 1-2), adequately quotes the basic form of contract on which respondent grounds its cause of action, its statement of facts brushes aside that portion of the agreement which contains a negative covenant on the part of the grantor (baseball player) not to grant rights to use his name, signature or picture "by any other manufacturer of chewing gum" (R. 518). This negative covenant is of importance in connection with the liability of petitioner for (a) inducing breach of contract by obtaining grants from baseball players who had signed such negative covenants and (b) for knowingly using rights granted under contracts in violation of that negative covenant.

The record is clear that the petitioner had full knowledge not only of the fact that respondent had contracts with baseball players but also of the exact form of the contract and notwithstanding (a) sought contracts with baseball players in violation thereof, and (b) used names

and pictures of baseball players who had granted exclusive rights to respondent. Thus the record shows:

Since 1939 (except for war years) respondent has been manufacturing bubble gum with pictures of baseball players (R. 724-5).

According to petitioner's President Shorin (petitioner is a family corporation; R. 317), it appears that sometime in 1949 or 1950 he formed the intention of putting out a chewing gum with baseball players' pictures (R. 333) and approached one Jackie Robinson from whose manager he learned of the respondent's contracts and thereafter discussed them with his attorney who obtained sample copies of those contracts (R. 475). Apart from the knowledge of the exact form of the contract which governed in 1950, Shorin was aware in 1948 that respondent must have had some form of contract with the players (R. 331-2). Notwithstanding, petitioner solicited contracts itself (R. 337). This solicitation was not particularly successful (R. 72) and so Players Enterprises, Inc. was organized by petitioner's president, its attorney and public relations counsel (R. 72, 473). This corporation solicited agreements making it only an agent (Def. Ex. M; R. 679-681), and Players Enterprises, Inc., a mere agent for petitioner (R. 760), gave it a license pursuant to the contracts which it had obtained in violation of respondent's contracts (Pltf. Ex. 44, R. 536).

Petitioner's own solicitation and that of its agent Players Enterprises, Inc. were clearly instances of inducing breach of contract.

Also, when with knowledge of respondent's rights in the premises it used pictures of players who were under contract to respondent as aforesaid, it interfered with respondent's exclusive rights whether or not it originally had induced the signing of the contracts which were in breach of respondent's contracts.

The issue is simply whether New York renders actionable such conduct on the part of petitioner.

## Summary of Argument.

The petition for certiorari is opposed on the following grounds:

1. The determination by the Court of Appeals involves merely local (New York) law.

2. The petitioner has taken the benefit of the judgment of the Court of Appeals by applying for a temporary injunction on the basis of the Court of Appeals' decision. The petitioner has thereby waived its right to have the judgment reviewed and reversed.

3. There is ample authority in New York to sustain a cause of action against a third party for (a) inducing breach of contract; (b) interfering with contract rights; and (c) interfering with property rights.

4. Assuming a "property right" to be necessary to support injunctive relief, the law of New York recognizes the rights herein granted to respondent by baseball players to be property rights.

(a) Judge FRANK's reference to a "right of publicity" was merely a shorthand description of the property right involved.

(b) Even prior to the adoption of the "Right of Privacy" statute (New York Civil Rights Law, Secs. 50, 51) there was a cause of action because of the use of a name or photograph where such use interfered with a right of property therein and did not merely injure feelings.

## POINT I.

**The petition should be denied because the cause involves only New York law.**

*Palmer* v. *Hoffman,* 318 U. S. 109, 118, rehearing den. 318 U. S. 800;
*cf. Steele* v. *Gen. Mills,* 329 U. S. 433, rehearing den. 329 U. S. 834.

Where only local law is involved, this court will "not review, save in exceptional cases, the considered determination of questions of state law by the intermediate federal appellate courts."

*Huddleston* v. *Dwyer,* 322 U. S. 232, 237.

As we shall see in subsequent points, the ruling of the Court of Appeals for the Second Circuit is amply sustained by New York authority and presents no exceptional situation for review by this court.

The petitioner urges that it should be granted certiorari because of a "conflict in circuits" (Pet. ¶3) claiming a conflict between the decision herein and *Hanna Mfg. Co.* v. *Hillerich & Bradsby Co.* (5th Cir. 1935) 78 F. 2d 763, cert. den. 296 U. S. 645.

There is no conflict for the reason that the *Hanna* case *supra* was decided prior to *Erie R. Co.* v. *Tompkins,* 304 U. S. 64 and did not necessarily involve the law of New York. Actually, the court in that case issued an injunction.

But even if there were conflict, that would not be ground for granting the writ because "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari."

*Ruhlin* v. *N. Y. Life Ins. Co.,* 304 U. S. 202, 206.

As stated in the *Ruhlin* case, *supra,* it is that portion of Subd. 5 of Rule 38 of this court's rules stating that the Court of Appeals "has decided an important question of local law in a way *probably in conflict with applicable local* decisions" (italics ours) which controls, rather than that portion of the rule which relates to mere conflicts among circuits.

Since as we shall see there is ample authority in New York to sustain the Court of Appeals judgment, there is herein no basis for the granting of the writ.

## POINT II.

### Petitioner has waived any right of appeal.

It is well settled that where one accepts the benefits of a judgment he waives his right to appeal therefrom; certainly he waives the right to appeal from that portion of which he has taken the benefit.

*Smith* v. *Morris,* 69 F. 2d 3;
*Kaiser* v. *Standard Oil Co. of New Jersey,* 89 F. 2d 58;
*U. S.* v. *Flower,* 108 F. 2d 298.

As the court said in the *Smith* v. *Morris* case, *supra,* at pages 4-5:

> "In doing this, he is confronted by a rule of law, than which none is better settled, that one 'who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens.' He cannot avail himself of its advantages, and then question its disadvantages in a higher court."

In the case at bar, petitioner urges this court to review the judgment of the Court of Appeals and hold that the contracts between the respondent and the baseball players gave to respondent nothing on which it could ground a cause of action. The petitioner has obtained similar contracts from the baseball players on which it has grounded a counter-claim against the respondent for allegedly inducing breach of petitioner's contracts or interfering with the petitioner's contracts (R. 38-39, 40-41).

After the decision by the Court of Appeals and based upon the decision of the Court of Appeals, the petitioner moved the District Court for a temporary injunction to restrain respondent from inducing breaches of petitioner's contracts and from interfering with petitioner's contracts.

Annexed hereto as Appendix I is a copy of the order to show cause obtained by petitioner on such motion for temporary injunction and supporting affidavits. These clearly show that petitioner was taking the benefit of the judgment of the Court of Appeals. Thus the order to show cause seeks an injunction "pending the hearing and final determination of this action on the remand from the Court of Appeals" and in Mr. Middleton's affidavit it is stated that "plaintiff used the names, pictures and biographical sketches of these breaching players during 1952 in knowing violation of defendant's rights and plans to use them in 1953. Each contract with these 221 players is, therefore, 'tainted with illegality and is utterly invalid' under the decision of the Court of Appeals."

And finally it is to be noted that the District Court on petitioner's motion for an injunction has in fact granted to petitioner a temporary injunction on its motion.

Since the only basis for granting petitioner an injunction is the decision of the Court of Appeals which it seeks to review and reverse we submit that petitioner by taking the benefit of the judgment has waived any right of appeal therefrom.

## POINT III.

**There is ample authority in New York to sustain a cause of action against a third person for inducing breach of contract.**

*Hornstein* v. *Podwitz,* 254 N. Y. 443;
*Lamb* v. *Cheney & Son,* 227 N. Y. 418.

To the extent therefor that the facts show that petitioner had induced breaches of contract, the Court of Appeals was entirely justified in reversing the District Court's judgment which had dismissed respondent's complaint *in toto.*

## POINT IV.

**There is ample authority in New York to enjoin a third party from interfering with contract rights of others.**

Apart from the tort of inducing breach of contract which is well recognized in New York and which in the last analysis is but one species of interference with contract rights, New York does not limit relief to cases where there has been an inducement to breach but grants relief as well where the defendant interferes with contract rights even though there was no inducement to breach.

*Reiner* v. *North American Newspaper Alliance,* 259 N. Y. 250;
*Fisher* v. *Star Co.,* 231 N. Y. 414, cert. den. 257 U. S. 654;
*Gonzales* v. *Kentucky Derby Co.,* 197 A. D. 277, *aff'd. sub. nom. Gonzales* v. *Reichenthaler,* 233 N. Y. 607;

*Madison Square Garden Corp.* v. *Universal P. Co. Inc.*, 255 App. Div. 459;
*Rudolph Mayer Pictures Inc.* v. *Pathe News*, 235 App. Div. 774;*
*Varsity Sportswear Inc.* v. *Princess Fabrics Co. Inc.*, 174 Misc. 298.

In the *Reiner* case the plaintiff "by his conduct [made] it impossible for the third party to receive the full benefits of the exclusive contract rights [to disseminate news of the maiden voyage of the *Graf Zeppelin*]" (p. 254; brackets ours). The court added (*ibid.*):

> "By such conduct he became liable to the same extent as he would if he had induced the breach of the third party contract by other means."

Thus in New York the same liability attaches to interference which makes it impossible for the contracting party "to receive the full benefits of the exclusive contract rights" as attaches where there has been an inducing of breach of contract.

In the case at bar, the use by petitioner of the names and pictures of baseball players who had granted exclusive rights to respondent is obviously an interference with respondent's contract rights and makes it impossible for it to receive the full benefits of its exclusive contract rights.

Interference with contract rights being a recognized tort in New York, it naturally follows that equity will enjoin where the tort is continuing thereby making the remedy at law inadequate.

*Gonzales* v. *Kentucky Derby Co., supra;*
*Heyman* v. *Biggs*, 223 N. Y. 118;

*While this case is a "no opinion" one, the gist of it is given in the *Madison Square Garden* case (255 App. Div. at p. 465).

*Sadlier* v. *City of New York,* 185 N. Y. 408;
*Coatsworth* v. *Lehigh Valley R. Co.,* 156 N. Y. 451.

This doctrine has been applied by the New York courts to comparable situations in which the exclusive right to take and distribute pictures of newsworthy events was being interfered with by a third party who obtained such pictures and was distributing them.

See:

*Madison Sq. Garden Corp.* v. *Universal P. Co. Inc., supra.*

In the light of the authorities cited in this and in the previous point it can hardly be said that the Court of Appeals for the Second Circuit has decided a question of local law "probably in conflict with applicable local decisions."

## POINT V.

**The rights granted by the ball players to the respondent are, under New York law, property rights entitled to protection both at law and in equity.**

If the exclusive rights granted to respondent are "property rights" then there can be no question of respondent's right to equitable relief against interference. Under the New York definition of a "property right" the respondent clearly acquired property rights.

New York follows the rule laid down by this court in *Internat'l News Serv.* v. *Asso. Press,* 248 U. S. 215, 236 that

> "The rule that a court of equity concerns itself only in the protection of property rights treats any

> civil right of a pecuniary nature as a property right * * * ; and the right to acquire property by honest labor or the conduct of a lawful business is as much entitled to protection as the right to guard property already acquired."

The New York Court of Appeals has stated it thus:

> "Any civil right not unlawful in itself nor against public policy, that has acquired a pecuniary value, becomes a property right that is entitled to protection as such."
>
> *Fisher* v. *Star Co., supra,* at p. 428.

The exclusive rights granted by the baseball players for use in the commercial exploitation of a commodity are patently rights of "a pecuniary value," and the grant of such rights obviously do not contravene public policy.

The value of these rights has been created by the labors of the individual baseball players who granted them and was made further commercially valuable by respondent in the conduct of a business. The fact that both petitioner and respondent are willing to pay for such rights clearly shows their pecuniary value.

Petitioner (Pet. Br., p. 18) in criticizing Judge FRANK for his use of the phrase "Right of Publicity" overlooks that Judge FRANK was merely using a phrase to describe the type of property right involved just as for example "right of ingress and egress" describes one form of property right while "right to possession" describes another form of property right.

So far as petitioner seems to think that the Court of Appeals "created" a new right (Pet. Br., p. 18) it is clearly in error (*Varsity Sportswear Inc.* v. *Princess Fabrics Co. Inc., supra*). In that case the New York court

protected the exclusive rights granted to the defendant by owners of various trade marks to use the trade marks on materials for ladies' dresses. In that case the New York court made an analogy to the right of the owners of the trade marks to advertise their products in magazines. The court was obviously protecting the grant of a right which could properly be described as did Judge FRANK in the phrase: "Right of Publicity." The court in *Varsity Sportswear, supra,* also pointed out that the grantee in that case was using the rights granted it to popularize its own products. So here. In the cited case, the New York court granted an injunction to protect the exclusive grant.

But whether or not "Right of Publicity" accurately describes the property right involved is beside the point. The fact remains that the granted right is a property right under New York law.

Petitioner seems to think, citing as its authority therefore a sports writer for the New York Herald Tribune (Pet. Br., pp. 19-20), that the decision below would prevent reporters from writing about baseball players. Apart from the inadequacy of the authority cited it is plain that the New York courts recognize a distinction between the use of a public figure's name and photograph for news purposes and the same use for commercial purposes.

*Gautier* v. *Pro-Football, Inc.,* 304 N. Y. 354, *aff'g* 278 App. Div. 431.*

The petitioner in this case has been using the names and pictures commercially; an opinion of a court is always to be correlated to the facts of the case; and by no stretch of the imagination can it be assumed that the court laid down any doctrine which would prevent a newspaper from writing about newsworthy events concerning the players.

*In this case the court recognized the " 'property' interest inherent and inextricably interwoven in the individual's personality * * * " (278 App. Div. at p. 438).

The petitioner also seems to think (Pet. Br., p. 16) that prior to the adoption by New York of its "Right of Privacy" statute (New York Civil Rights Law, Secs. 50-51) there was no right to enjoin the use of a name or of a photograph. Such a view is erroneous.

> *Rhodes* v. *Sperry & Hutchinson Co.*, 193 N. Y. 223.

For its proposition, petitioner relies upon *Roberson* v. *Rochester Folding Box Co.*, 171 N. Y. 538. But the *Roberson* case held no such doctrine as petitioner would seek to extract therefrom. All that the *Roberson* case held was this: That if the only injury resulting from an unauthorized use of a photograph was an *injury to feelings* there was no cause of action either at law or in equity.

The court repeatedly stressed, on almost every page of its opinion, that the only injury alleged by the plaintiff in that case was an injury to her feelings, sometimes described therein as "mental distress." Such holding was merely an application of the well-settled rule in New York that where the injury is only to the feelings there is no cause of action.

> *Mitchell* v. *Rochester Ry. Co.*, 151 N. Y. 107; *Comstock* v. *Wilson*, 257 N. Y. 231.

The courts of New York never held that if there was an injury to a property right a cause of action would not lie because it involved the publication of a photograph, rather than some other property right.

When several years later—the "Right of Privacy" statute having been adopted in the meantime—the validity of that statute came before the New York Court of Appeals, that court pointed out that even before the statute there was, under certain circumstances, property rights in

photographs which "the owner [grantee of the subject of the photograph] is still at liberty to use for advertising or trade purposes * * * his property rights therein are unaffected by the statute."

*Rhodes* v. *Sperry & Hutchinson Co., supra,* at page 230.

To state it briefly, the situation in New York was that prior to the "Right of Privacy" statute the use of a name or photograph if constituting an injury to property rights could be enjoined; if on the other hand the only injury resulting therefrom was to the feelings, there was no cause of action. The "Right of Privacy" statute provided a cause of action in such situation even if the injury was only to feelings; but that is not to say that concomitantly the statute *destroyed* a cause of action for injury to property existing without the statute.

The case of *Pekas Co.* v. *Leslie, et al.,* 50 N. Y. L. J. 1864 is not in conflict. The justice of the court of original jurisdiction who wrote the opinion in that case recognized that the "Right of Privacy" statute dealt with a cause of action "for outraged feelings." The actual question involved in that case is of no pertinence here. The court was considering whether a cause of action under the statute could be assigned and held that since the cause of action was merely for "outraged feelings" it could not be under New York law. We are not here dealing with a cause of action under the "Right of Privacy" statute nor of the right of assignment thereof. We are dealing with the right of respondent *qua* owner to have its contract and property rights protected against interference by the petitioner.

And finally it is to be observed that the New York courts recognize the right of one who has made his name commercially valuable to grant rights of user exclusively

to others without the transfer of a business or anything else, *i.e.* "in gross."

*Wood* v. *Duff-Gordon,* 222 N. Y. 88.

In that case the defendant gave to the plaintiff "the exclusive right, subject always to her approval, to place her endorsements [*i.e.* her name] on the designs of others" it being the fact that "Her favor helps a sale" (p. 90).

The New York Court of Appeals enforced the contract. It did not hold as did the District Court herein which was reversed by the Court of Appeals that plaintiff got nothing because a name is not "vendible in gross" (R. 719). Actually, the baseball players do not, by their contracts, "transfer" their names; they merely grant a limited right of user thereof.

In the case at bar, the baseball players gave respondent the right to use their names and photographs in connection with the sale of a product. The respondent is as much entitled to have its contracts therefor enforced as was the plaintiff in the *Duff-Gordon* case. While the *Duff-Gordon* action was between the immediate parties to the contract that is of no moment because, as seen, the immediate parties to the contract are entitled to protection against interference therein by third parties.

## POINT VI.

**The petition should be denied.**

Respectfully submitted,

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## APPENDIX I.

IN THE

UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF NEW YORK

Civil Action No. 11852

HAELAN LABORATORIES, INC.,

*Plaintiff,*

—VS—

TOPPS CHEWING GUM, INC.,

*Defendant.*

UPON THE PLEADINGS AND PROOFS herein, the opinion of the Court of Appeals as supplemented, the order on the mandate of the Court of Appeals, and the affidavits of Joseph E. Shorin and George E. Middleton, it is

ORDERED that plaintiff Haelan Laboratories, Inc., or its attorneys, show cause before the United States District Court for the Eastern District of New York in Room 214 on the sixth day of April, 1953, at 10:30 o'clock in the forenoon or as soon thereafter as counsel, the parties and their witnesses can be heard why an order should not be made herein granting the defendant the following relief:

1. Pending the hearing and final determination of this action on the remand from the Court of Appeals, restraining and enjoining the plaintiff Haelan Laboratories, Inc., its agents, servants, employees, privies, successors and

assigns, and all others holding by, through or under its control, from

(a) Soliciting any of the baseball players, with whom defendant has contracts giving it exclusive rights to use their names, pictures and biographical sketches in 1953 in connection with the advertising, sale or distribution of candy or chewing gum, as appears from schedule A attached to the affidavit of Joseph E. Shorin, to grant the plaintiff or any of its privies a license to use the name, likeness, signature or biographical description of any such baseball player in connection with the sale, advertising and/or promotion of any chewing gum, chewing gum products and/or confection, and from

(b) Selling and/or delivering directly or indirectly any chewing gum, chewing gum product and/or confection along with any cards bearing the name, likeness, signature and/or biographical description of any baseball player listed in said schedule A, or any baseball player listed in schedule B attached to the affidavit of George E. Middleton.

2. Granting defendant such other and further relief as may be just.

Sufficient cause therefor appearing, it is

1. ORDERED that pending the hearing of this motion, the plaintiff, Haelan Laboratories, Inc., its agents, servants, employees, privies, successors and assigns and all others holding by, through or under it or under its control be and they hereby are enjoined and restrained from

(a) Soliciting any of the baseball players, with whom defendant has contracts giving it exclusive rights to use their names, pictures and biographical sketches in 1953 in connection with the advertising, sale or distribution of candy or chewing gum, as appears from schedule A attached to the affidavit of Joseph E. Shorin, to grant the plaintiff or any of its privies a license to use the name, likeness, signature or biographical description of any such baseball player in connection with the sale, advertising and/or promotion of any chewing gum, chewing gum products and/or confection, and from

(b) Selling and/or delivering directly or indirectly any chewing gum, chewing gum product and/or confection along with any cards bearing the name, likeness, signature and/or biographical description of any baseball player listed in said schedule A, or any baseball player listed in schedule B attached to the affidavit of George E. Middleton.

2. ORDERED that service of this order with copies of the affidavits and schedules referred to upon plaintiff's attorney be deemed good and sufficient if made upon defendant's attorneys on or before the 30th day of March 1953.

C. G. GALSTON
United States District Judge

Brooklyn, New York
March 27, 1953

*Appendix I.*

AFFIDAVIT OF JOSEPH E. SHORIN.

[SAME TITLE]

State of New York
County of New York—ss.:

I, JOSEPH E. SHORIN, being duly sworn depose and say:

I am president of Topps Chewing Gum, Inc., defendant in this action.

Players' Enterprises, Inc., having acquired from certain major league baseball players the exclusive right to use their names, pictures and biographical sketches in connection with the sale of commodities with the right to sublicense others, has given to Topps, and Topps is now entitled to enjoy, the exclusive right to use the names, pictures and biographical sketches of the players listed on the schedule attached to this affidavit in connection with the advertising sale and distribution of chewing gum or candy for the year 1953. The players whose names are marked with an asterisk are players whose New Players' Enterprises contracts, in evidence as Defendant's Exhibit Y, were renewed for the year 1953. These players either have no contract with plaintiff or, if they have, that contract was executed subsequent to the execution of prior contracts between the player and Players' Enterprises or Russell Publishing Company, and the rights ostensibly given were used in knowing violation of defendant's rights.

I do not have the names of all of the players whose names, pictures, and biographical sketches plaintiff will use in 1953, but I know it is using the following eight players to whom defendant has exclusive rights:

*Appendix I.*

| | |
|---|---|
| Sid Gordon | Al Rosen |
| Monte Irvin | Hank Sauer |
| Ted Kluszewski | Herman Wehmeier |
| Manny McDermott | Gus Zernial |

When plaintiff's complete list is revealed I feel reasonably sure that it will contain the names, pictures and biographical sketches of many more players to whom defendant has exclusive rights for 1953 and to whom plaintiff has no rights whatsoever.

J. E. Shorin

Subscribed and sworn to before a Notary Public on March 25, 1953.

---

Schedule of Baseball Players Whose Names, Pictures and Biographical Sketches Topps Chewing Gum, Inc., Has the Exclusive Right to Use in 1953 in Connection With the Advertising, Sale and Distribution of Candy and Chewing Gum.

[List of 68 names]

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Affidavit of George E. Middleton.

[SAME TITLE]

State of New York
County of New York—ss.:

I, George E. Middleton being duly sworn depose and say:

I am the attorney for defendant and am familiar with this litigation.

*Appendix I.*

Plaintiff claims to have the exclusive right to use, in 1953, the names, pictures and biographical sketches of 410 baseball players in connection with the advertising, sale and distribution of its chewing gum, based on contracts typified by Exhibits 36 and 38. The record shows, however, that plaintiff's contracts with 221 of these players were executed subsequent to and in breach of contracts signed by them with Russell Publishing Co. or Players Enterprises under which defendant had exclusive rights. A schedule of these breaching players is attached to this affidavit.

Plaintiff used the names, pictures and biographical sketches of these breaching players during 1952 in knowing violation of defendant's rights and plans to use them in 1953. Each contract with these 221 players is, therefore, "tainted with illegality and is utterly invalid" under the decision of the Court of Appeals.

GEORGE E. MIDDLETON

SUBSCRIBED AND SWORN TO before a Notary Public on March 26, 1953.

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SCHEDULE OF PLAYERS WHO BREACHED CONTRACTS WITH RUSSELL PUBLISHING COMPANY OR PLAYERS ENTERPRISES, INC. WHEN THEY SIGNED PLAINTIFF'S CONTRACTS OF EXHIBIT 36 AND 38.

[List of 213 names]